No. 20266

United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA, *Appellant*,

vs.

DEWEY SORIANO, *Appellee*.

BRIEF OF APPELLEE

SUMMERS, HOWARD & LE GROS
CHARLES B. HOWARD
RICHARD W. BUCHANAN
Proctors for Appellee

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BRIEF OF APPELLEE

I
INTRODUCTION

A. JURISDICTION

Appellee Soriano concurs with the basis of jurisdiction as set forth in Government's Brief at page 2, relating to the only cause with which Soriano is concerned, namely: United States of America versus Soriano, Admiralty Cause No. 16853 below and Cause No. 20266 in this Court.

B. CASES INVOLVED IN PRESENT APPEALS

Because for convenience and economy it was agreed that several actions involving the same casualty but different interests be consolidated for purposes of trial, and since three of these actions are similarly consolidated for purposes of the record and hearings on appeals to this Court, we set forth the distinguishing features of each case.

1. Private Cargo versus the Government

Subrogated cargo underwriters paying certain loss or damage claims brought suits, *inter alia,* under the Suits in Admiralty Act, Title 46 U.S. Code §742 et seq, against the United States of America based upon alleged negligence of the Government with respect to navigational charts, navigational aids and handling of information relative to the conditions existing in the locale where the ISLAND MAIL struck an unidentified and uncharted underwater object. These interests (hereinafter referred to as "Private Cargo") did not join pilot Soriano as a party respondent, although they were free to do so. This was Admiralty Cause No. 16875 below, now Cause No. 20130 in this Court.

2. Private Cargo versus American Mail Line (Limitation Proceedings)

Subrogated cargo underwriters (Private Cargo) filed claims in the proceedings for Limitation or Exoneration from Liability initiated in the Court below by American Mail Line as bareboat charterer of the ISLAND MAIL. This was in Admiralty Cause No. 16733 below, now Cause No. 20129 in this Court. The basis of Private Cargo claims to defeat limitation of liability sought by the Charterer was alleged unseaworthiness of the ISLAND MAIL with respect to the fathometer and sounding machine aboard the vessel on 29 May 1961 when the casualty occurred. Pilot Soriano was not a party in this limitation proceeding.

3. Government versus Soriano (Sometimes hereinafter referred to as Soriano case)

The Government alleged that it sustained a loss in the amount of $202,294.10 by reason of damage to government cargo aboard the ISLAND MAIL at time of the casualty (CR 42). For this claimed loss, the Government brought separate action against Pilot Soriano by Admiralty Cause No. 16853 below, now Cause No. 20266 in this Court, claiming negligence of the pilot as the cause of the casualty.

C. PRE TRIAL STIPULATIONS AND CONTENTIONS

During extensive pretrial proceedings conducted under the direct supervision of the trial judge, certain significant stipulations, admissions or contentions were made which vitally and materially affect the positions of the parties on these related but independent appeals:

(1) It was agreed and ordered that the liability aspects of the several cases would be tried together, but would be subject to separate contentions and proof by the parties having different issues, contentions and basis for liability or defense. (CR 82)

(2) The Government, Private Cargo and American Mail Line all agreed and put in the Pretrial Order admissions that the ISLAND MAIL struck the 3.5 fathom rock located just a little over 0.1 mile inside the western boundary of the 10 fathom curve around Smith Island. (CR 36, 43, 75).

(3) In the case of Government versus Soriano, there was no similar admission as to what or where the ISLAND MAIL struck on 29 May, 1961. Government contended in the Pretrial Order that the vessel did strike the rock just inside the 10 fathom curve (CR 36) while Soriano contended that the ISLAND MAIL struck an uncharted underwater object while just outside (westerly) of the boundary of the 10 fathom curve around Smith Island (CR 57).

(4) Government contended in the Soriano case (and in other cases) that the pilot was negligent in certain specified particulars, including alleged failure to take proper bearings, to allow for the set of the current, to accurately fix the position of the vessel, to consult charts and to give the area west of Smith Island a sufficiently wide berth while making a passage around the Island to proceed north toward Bellingham (CR 36-37).

(5) Soriano denied these contentions of the Government. In addition to his contentions as mentioned in (3) above, Soriano claimed that in the area through which he was piloting the ISLAND MAIL, the Government charts and other navigational publications showed safe depths of water and no underwater objects existing which would be dangerous to safe passage of vessels of the size and draft of the ISLAND MAIL (CR 57-58). He contended that if the Government, after the 1952 CROCKER incident in the same area,

had performed its statutory duties in a non-negligent manner by investigating, marking underwater dangers in the prescribed manner, and publishing accurate charts and other notices to mariners (and pilots) as to known or reported hazards existing in the area, he would have given the west side of Smith Island a wider berth when piloting the ISLAND MAIL on the day of its casualty in 1961, and the accident would not have happened (CR 61-64).

Because of the different admissions and contentions between the parties in the several cases as to the position of the vessel and the location of the underwater object which it struck, it became necessary for the trial judge to make vitally important distinctions in deciding the issues presented for trial by the Pretrial Order. Thus, the trial judge was confronted with a stipulated argreement in the other cases as to location of the submerged rock contacted by the hull of the ISLAND MAIL, while in the case of Government versus Soriano there was a factual issue left for determination by the Court as to where and what the vessel struck.

D. DECISION OF THE COURT BELOW

Both by its primary Memorandum Decision (Tr. 1129) and by the separate Findings of Fact and Conclusions of Law entered thereafter by the Court (CR 149, 232, 273, 278-79) the trial Court carefully maintained this

distinction (see particularly Finding No. 15 at CR 149.)[1/]

E. GOVERNMENT SPECIFICATIONS OF ERRORS IN SORIANO CASE

The only Findings of Fact in the Soriano case that are challenged by Specifications of Error and claimed by the Government in its Brief to be in error are the following two findings, which are quoted in full for convenient reference:

Finding of Fact No. 24

> "The evidence and all permissible inferences that can be drawn therefrom fail to establish by a fair preponderance that the M/V ISLAND MAIL was actually inside the 10 fathom curve at the time it struck an uncharted and submerged rock on May 29, 1961." (CR 278)

This refers to Government Specification of Error No. 5 (GB 56-7, 73).

Finding of Fact No. 25

> "The evidence and all permissible inferences that can be drawn therefrom fail to establish by a fair preponderance that the M/V ISLAND MAIL could have or did actually strike the 3.5 fathom rock." (CR 279)

[1/]In the course of its Oral Opinion the trial Court stated:

"The Government contends that Captain Soriano negligently permitted his vessel to penetrate the waters within the 10-fathom curve in the area around Smith Island, an area of danger, and to there strike the rock first mentioned in Paragraph 10 of the pretrial order and identified as "Rock — 3.5 Fathoms — 22 Ft," on Exhibit 79-A. For purposes of convenience, the Court will refer to this rock as the 3.5 rock.

"Captain Soriano, on the other hand, denies that he

This refers to Government Specification of Error No. 6 (GB 57, 77).

Under the applicable Rules for Appeals in the Ninth Circuit and decisions of this Court, the Government must be restricted in its appeal herein against Soriano to discussion, consideration and determination as to the acceptability of these two Findings of Fact. Any attempt to collaterally or secondarily attack other Findings of Fact against which there has been no Specification of Error should not be permitted, since it would violate the requirements of Rule 18(2) (d) of this Court. *Pacific Queen Fisheries v. Symes* (CA 9, 1962), 307 F.2d 700, 705 footnote 5.

In applying this section of the rule in another civil case where the specifications of error did not cover all the points raised by the earlier filed statement of points to be relied upon on appeal, this Court has stated:

> "Failure to comply with this rule relieves this Court of considering the omitted errors, even if the errors are set forth elsewhere in the record. (Citing case) Therefore we will deal only with the specification set forth in the brief."

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was so negligent and that the ISLAND MAIL struck the 3.5 rock. In fact, Soriano contends that his vessel struck an underwater object outside the 10 fathom curve and that it was physically impossible for the ISLAND MAIL to have made contact with the 3.5. (Tr. 1129-30) * *

"Commercial Cargo and the Government have agreed that the ISLAND MAIL struck the 3.5 rock and in adjudging the liability of the Government to Commercial Cargo the Court must accept this stipulation as true." (Tr. 1145, CR 281A-282, 295)

Everest & Jennings, Inc. v. E. & J. Mfg. Co. (CA 9, 1959) 263 F.2d 254, 258.

A more detailed and specific statement of the requirements for Specifications of Error in an appellant's brief in the Ninth Circuit was made in another civil case in 1955 when this Court stated:

> "One of these requirements is that briefs in all cases shall contain 'a specification of errors relied upon which shall be numbered and shall set out separately and particularly each error intended to be urged.' Appellants' specifications of error 1, 3, and 4 each allege four or more separate errors. Specifications of error which set out more than one error are improper and need not be considered. Mutual Life Ins. Co. of New York v. Wells Fargo Bank & Union Trust Co., 9 Cir., 86 F.2d 585, 587. Here, appellants' first specification of error combines alleged errors as to five findings of fact, four conclusions of law, and two distinct questions relating to the admissibility of evidence. The specification does not, as this provision of the Rule requires, 'state as particularly as may be wherein the findings of fact and conclusions of law are alleged to be erroneous.' Defects in this particular are not remedied by referring the reader to the pages of the brief where the points are argued. Cf. Monaghan v. Hill, 9 Cir., 140 F.2d 31, 34. Further, in disregard of the Rule, the particular points raised are not stated in full before being discussed, several allegedly erroneous findings of fact are joined under one heading for argument, and there is a failure to state with particularity wherein some of them are thought to be erroneous."
>
> *Thys Co. v. Anglo California Bank* (CA 9, 1955) 219 F.2d 131, 132-33.

More recently this Court has set forth its position with regard to Specifications of Error as follows:

> "Appellants challenge many of the findings of fact, quoting substantial parts of such findings in the specifications of error. The specifications of error, however, contain no indication of the particular respects in which the quoted findings are erroneous. Nor, with one exception, is this information expressly stated elsewhere in appellants' brief. There is a considerable discussion of the evidence in that brief, but none of it, with the one exception mentioned above, is referenced to any particular finding of fact or specification of error."
>
> *Anaconda Building Materials Co. v. Newland* (CA 9, 1964) 336 F.2d 625, 628.

Other Specifications of Error (Nos. 1, 2, 3, 4, 7 & 8) in the Government brief (GB 56-57) relate solely to Conclusions of Law II, III and IV. These will be discussed in detail under Section IV of this brief.

II

COUNTER-STATEMENT OF CASE BY APPELLEE SORIANO

A. SS CHARLES CROCKER INCIDENT 18 JUNE, 1952

The Government Brief devotes almost thirty pages in the initial part of its Statement of the Case to the CROCKER INCIDENT (GB 3-32) and thereafter discusses the navigation and circumstances of that prior casualty at considerable further length (GB 104-110). Appellee Soriano will undertake to recast the CROCKER incident in its proper focus *vis a vis* the Soriano case and the other cases.

At the outset, it is important to note that in the Soriano case the CROCKER incident is not as crucial to the determination of liability, as in the other cases on appeal. However, the CROCKER incident is pertinent in the Soriano case to show the origin or source of Government negligence in that inaccurate, affirmatively misleading and incomplete information was furnished to pilots and navgators such as Soriano with regard to hazards known by, or which should have been known by, the Government after 1952 to be dangerous to navigation of deep draft vessels such as ISLAND MAIL in the area west of Smith Island. It also becomes significant in the Soriano case because of the strikingly close positions for impact of the CROCKER and the ISLAND MAIL as independently fixed nine years apart by the navigators on both vessels and pilot Soriano on the ISLAND MAIL.

Both CROCKER and ISLAND MAIL were northbound from Puget Sound intending to pass westerly of Smith Island and proceed up Rosario Straits. (CR 24, 271-73, Tr. 645) Both vessels struck unidentified and uncharted submerged objects when their navigators (and pilot Soriano on ISLAND MAIL) calculated their vessels to be about 2.0 miles west of Smith Island and just outside the westerly boundary of the 10 fathom curve, and while both vessels were on a gradual turn to the right to enter Rosario Straits. (CR 24, 271, 273, Tr. 645, 649-50) Both vessels had excellent visibility (Tr. 88, 646).

After the CROCKER incident in 1952 the Government

placed on its navigation (Coast and Geodetic Survey) charts a notation "Wreckage rep. 1952" at a point outside the westerly boundary of the 10 fathom curve around Smith Island (CR 29). The closest fathom or depth marks adjacent to this point on the Government charts showed 11, 14 and 37 fathoms, meaning 66, 84 and 222 feet depths of water at datum. (Tr. 139-40, 746) Compare this with the draft of the ISLAND MAIL on departure Seattle on date of the accident; i.e., 24'00" forward and 29'02" aft (CR 106).

Both CROCKER and ISLAND MAIL sustained generally similar types of hull damage, namely, a ripping of the bottom, (Tr. 661, Tr. 609-18, Ex. 37) yet neither vessel remained stranded or impaled on the unidentified underwater object which each vessel contacted in this same area. (Tr. 579, 589, CR 25, 31, Tr. 654, 656).

After the CROCKER incident the Coast Guard conducted an extensive investigation of the casualty (Tr. 1015-53). The Investigating Officer concluded that the CROCKER must have struck a rock *inside the 10 fathom curve* west of Smith Island. (Tr. 1053-57 Tr. 1064). This was included in the Investigating Officer's official report to the Commandant of the Coast Guard (Ex. 40, Tr. 1057). Nevertheless, the Government continued for nine years merely to show the "Wreckage rep. 1952" notation on its charts *outside the 10 fathom curve* and with no new, different or changed notations to show any underwater

hazard to navigation just inside the 10 fathom curve west of Smith Island (CR 29).

Likewise, other Government publications, such as the COAST PILOT (Exs. 62, 124), for the area were not changed in either their annually published supplements after 1952, or in later editions, to make any reference whatsoever to the "Wreckage rep. 1952" as a hazard to surface navigation, or to mention any known or suspected underwater object dangerous to navigation either just outside or just inside the 10 fathom curve west of Smith Island (CR 21-22).

It was in this posture and climate as to navigational and chart data negligently provided by the Government that appellee Soriano found himself on the ISLAND MAIL on 29 May, 1961 when he was piloting that vessel past Smith Island in the only area remaining open to navigation of merchant vessels during daylight hours, due to military and naval restrictions imposed by the Government both east of Smith Island and further west from Smith Island (CR 29-30, GB 33). Although he had fished commercially in the area many years before, and had been a navigator or pilot aboard vessels on many more recent trips through the same area, Soriano had no personal knowledge as to any underwater object in that area which might be a hazard or danger to navigation of surface vessels (Tr. 490). Other Puget Sound pilots likewise had no special knowledge of any underwater dangers in this area west of Smith Island near the 10 fathom curve

and relied on the information supplied on Government charts and in the COAST PILOT (Tr. 269, 733, 786, 826).

B. ISLAND MAIL VOYAGE AND ACCIDENT 29 MAY, 1961

As a Puget Sound Pilot, licensed by the State of Washington under its Pilotage Act, R.C.W. 88.16, appellee Soriano was dispatched on the morning of 29 May to serve as a compulsory pilot on the partially laden ISLAND MAIL from Seattle to Bellingham, requiring transit past Smith Island (CR. 269-70).

The weather was clear and sunny, with calm seas, slight wind and good visibility (CR 16). The watch mate stated that visibility was at all times excellant. (III C.Gd. 312) Soriano testified that from Seattle to Smith Island he had no problem in seeing any landmarks (Tr. 407). "Clear vision. The visibility was beautiful." (Tr. 88)

During the passage from Seattle to Smith Island, speed of the vessel over the bottom varied from 12 to 15 knots at various times and stages of tide, on a full ahead engine telegraph bell (Tr. 411-12, III C.Gd. 269). Pilot Soriano kept a record of positions, distances off and times abeam various points in a pocket notebook (Ex. 17, Tr. 407).

Between Seattle and Smith Island, Pilot Soriano took numerous beam bearings off the various points, landmarks and navigation aids, and line of vision bearings on objects ahead of the vessel. In doing this he used his seaman's

eye and the azimuth circle on the gyro-compass repeater (Tr. 20-38, 408-10, 423). This was the customary and standard procedure for Puget Sound pilots (Tr. 127, 143, 778-79, 782-83, 835).

The mate on watch was also taking independent bearings during this passage (III C.Gd. 280). In addition, pilot Soriano took several bearings off the bow on objects ahead of the vessel by means of a device known as a Kenyon calculator, which he carried for this purpose (Ex. 43). This was for the purpose of checking his seaman's eye bearings (Tr. 408-09).

The radar set was not turned on for use during this daylight passage in unrestricted visibility (Tr. 79). Puget Sound pilots do not consider it necessary to use the radar (if available on a given ship) under such excellent visibility conditions in these well-known areas of piloting (Tr. 778-9, 792, 835).

Soriano intended to pass (and turn) to the west of Smith Island at a minimum distance off of 2.0 or 2.1 miles (Tr. 404). This would be just outside the 10 fathom curve as defined on the Government charts for the area (Tr. 61, 463,64, Exs. 133, 133-A). He had followed this course track on previous occasions and had plotted it on his personal pilot's charts (Tr. 48, 93). It was not necessary for him to refer to these charts or to the ISLAND MAIL charts on the day in question as the information contained on the charts was well know to him (Tr. 82-83, 47, 49).

This is also the general practice of other Puget Sound pilots (Tr. 255), who do not regard it as either necessary or proper for a local pilot to be referring to charts or making a plot during performance of normal pilotage duties, with consequent distraction from the important job of keeping personal watch on the position and movement of the vessel (Tr. 82, 94, 152, 256, 784).

Soriano made allowances for the affect of currents encountered by the ISLAND MAIL while between Seattle and Point Wilson before crossing the eastern end of Straits of Juan de Fuca past Smith Island (Tr. 18-19, 84). He did not make any further allowances for any current set north of Point Wilson and Partridge Point as his experience as a pilot and navigator in the area had shown that there was no significant or consistent current on a flood tide, either by direction or velocity, until a vessel had passed beyond Smith Island (northbound) and was approaching Rosario Straits or Haro Straits (Tr. 85, 90, 72). Other Puget Sound pilots confirmed that no easterly set of the current would be experienced on a flood tide when northbound between Partridge Point and Smith Island, west side (Tr. 776-77, 830, 834).

Approaching Smith Island from off Partridge Bank pilot Soriano had the ISLAND MAIL on a course and heading of 335° per gyro, intending to first come abeam the lighthouse on Smith Island at a distance off of 2.6 miles (Tr. 93, 424). Previous courses run, distances off various points,

buoys and lights, and plotting of the same by Soriano during the trial on Ex. 133, are detailed in his testimony. (Tr. 412-422). They are substantiated in all material respects by the testimony and plotting of watch mate Gunderson (III C.Gd. Tr. 244-268, Exs 8, 9).

Soriano maintained the ISLAND MAIL on course 335° per gyro from 1512 hours when abeam Partridge Point lighted buoy (Tr. 421-22) until the vessel first came abeam Smith Island 2.6 miles off at 1535 hours (Tr. 424). This was substantiated (within 0.1 mile) by mate Gunderson (III C.Gd. 278-79, 282) Speed of the vessel over the ground between these points and up to time of impact was estimated by Soriano at 13 knots (Tr. 489). The master and watch mate concurred on speed from 13 to 14 knots (Tr. 573, 605, III C.Gd. 269, 281). During this interval of 23 minutes pilot Soriano took continuous line of vision bearings on Salmon Bank Buoy, Cattle Point Light and Smith Island Light (Tr. 422-425, 430-32). These were laid down by pilot Soriano on Ex. 133-A at trial (Tr. 431).

Course was changed 15° to right to 350° at or just before the time when ISLAND MAIL first came abeam Smith Island 1535 hours. Substantially the same time and the precise course change is related in the testimony by mate Gunderson (III C.Gd. 279). This course was run approximately 5 minutes or until 1540 hours when Soriano determined that Minor Island Light was abeam at a distance off of 3.5 miles. He then ordered 5° right rudder to enable the vessel to turn slowly toward the intended new course

of 035° (Tr. 426). Mate Gunderson confirms this (III C.Gd. 280). The ship started a very slow swing to the right (Tr. 434, 445). Shortly thereafter the ship "tilted", first to the left or port and then a little to the starboard. (Tr. 445-46). The master came from his quarters to the bridge and the watch mate went immediately to the flying bridge to take gyro bearings (III C.Gd. 283). The pilot then took further bearings on Smith Island, Iceberg Point and Davidson Rock, using the azimuth circle and gyro compass repeater on the wing of the bridge to sight, and established that Smith Island Light was "approximately two miles away" (Tr. 446). This was at 1543 hours (Tr. 449). Mate Gunderson's independent bearings likewise established distance off Smith Island of "about two miles" (III C.Gd. 289). Any difference in position obtained from pilot's and mate's bearings was explained by the watch mate (III C.Gd. 315-17, Tr. 461).[2] Chief Mate White made a similar estimate of 2.0 miles off Smith Island from his observations immediately following the incident (III C.Gd. 230, 234-35).

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[2]/The Watch Mate on duty with pilot Soriano was asked the following question by the Coast Guard Investigating Officer:

"Q One other question, Mr. Gunderson, rather important: Would you state whether or not at all times that you were the watch officer of this ship from the time you came on watch until the stranding the vessel appeared to you to be in proper and safe position?

"A There was never any doubt in my mind, either before, during or after the grounding, that it was a safe and proper position. (III C.Gd. 308)

At 1544 hours the engine telegraph was rung up Stop (Tr. 449). Soriano and mate Gunderson both estimated that the impact occurred at 1542 hours, being two minutes after the order 5° right rudder, one minute before Mate Gunderson estimates he took the last above mentioned bearings, and two minutes before the main engine was stopped. (Tr. 454, III C.Gd. 288, 322-23).

At time of trial Soriano marked his calculation as to position of ISLAND MAIL at time of impact on Exh. 133-A (Tr. 454-55), later transfered to Exh. 79-A (Tr. 455). This is about 100 yards from the position that the master of the CROCKER reported his vessel struck an underwater object nine years previously. (Tr. 655). It is about 0.22 mile from the point figured by the Master of the ISLAND MAIL for the impact, based on a position for the ship which he established by radar at 1550 hours, about 8 minutes after the casualty, using the navigator's runback method (Tr. 635). It is on the same course track and just a little over 0.1 mile from the fix independently obtained by the mate on watch from three bearings obtained by him within a minute or so after the impact and immediately placed on one of the ISLAND MAIL charts (III C.Gd. 284. 287, Tr. 461, 597-99, 604-07, Ex. 79-A, Ex. 123).

This position is about 150 yards outside the westerly boundary of the 10 fathom curve and at a point where the Government charts had shown for years that there was 14 fathoms or at least 84 feet (plus rise in tide) of

water available for navigation. There was nothing shown on the charts or in the Government published COAST PILOT along the track of the projected course line for the ISLAND MAIL, or within a half mile on either side of the same, which could be regarded as a navigational hazard or underwater danger to a vessel of the size and draft of the ISLAND MAIL (Tr. 462, 741-43, 827).

C. GOVERNMENT CHARTS AND NAVIGATIONAL PUBLICATIONS AS OF TIME OF ISLAND MAIL CASUALTY

By its Contentions in the Pretrial Order (see particularly Nos. 15, 17, 18, 19 & 20), appellee Soriano claimed as one of his principal defenses that the Government had either failed in, or had negligently performed, its duty to survey, investigate, locate the position and nature of, mark on charts and otherwise warn mariners of, the existence of underwater hazards to navigation of vessels in the area west of Smith Island. These contentions are premised upon notice and knowledge available to agencies of the Government following the CROCKER incident in 1952.

In the companion case of Private Cargo versus Government (Docket No. 20130 in this Court), the trial Court specifically found that the Government had been negligent in failing to disseminate to mariners, prior to the ISLAND MAIL casualty in 1961, information obtained by it following investigation of the 1952 CROCKER incident (CR 158). The trial Court also found a lack of coordination between the Coast Guard and Coast and Geodetic Survey, two Government agencies, with respect to valu-

able information obtained by the Coast Guard following the CROCKER incident (CR 154).

The same impediment on the proximate cause question does not exist in this case of Government versus Soriano as was presented in the companion case of Private Cargo versus Government since there had been no stipulation or admission by Soriano that ISLAND MAIL struck the same rock as CROCKER. In this case the trial Court simply held that, in view of the fact that the Government had failed to prove that Soriano, as pilot, had allowed the ISLAND MAIL to get inside the 10 fathom curve (CR 278-79), or to strike the 3.5 fathom rock (CR 279), there was no basis for the Government to recover against Soriano. Hence, the trial Court held that there was no necessity for making Findings in this case as to Government negligence (FF 19, CR 275) as had been done in the companion case of Private Cargo versus Government (FF 27, CR 154) and (FF 41, 158-59).

Thus, it becomes proper on this appeal to consider the Government negligence as it affected the piloting by Soriano, and his reliance upon Government charts, navigation publications and manuals.

Contrary to the statement in Government's brief at page 26 (unsupported by citation to the record or transcript), the misleading and inaccurate "Wreckage rep. 1952" notation on the Coast and Geodetic Survey charts of the Government did have a "relation" to or bearing upon

the ISLAND MAIL grounding. This notation was placed on the Government charts where it otherwise appeared that there was adequate depth of water for safe passage of vessels such as ISLAND MAIL (Tr. 969). The "Wreckage rep. 1952" notation did not conform to any of the various types of Danger Symbols, including wreckage symbols, prescribed by the Government for use on such charts, as will be discussed in more detail hereafter. (See Ex. 16)

Mr. Edmonston, as Chief of the Government office which was responsible for preparation of nautical charts, admitted that no wreckage or obstruction symbol as prescribed in Ex. 16 was placed on the charts after the CROCKER incident (Tr. 976).

Captain Lindholm, as a Government witness, testified that there was no prescribed wreckage symbol on the charts at this point (Tr. 137). He also testified that there was no prescribed symbol on the charts to show that either the position or existence of such report of wreckage was doubtful (Tr. 141-143).

The use of blue tinting on the Government charts with relation to the "Wreckage rep. 1952" location was inconsistent (Tr. 743). Some charts were tinted blue inside the small circle (Ex. 64, 70, 74, Tr. 154-55) while other charts (Tr. 945-46, Tr. 971-72) had no such blue tint within the circle (Exs. 65, 129, 133, Tr. 136-38).

No fathom or depth numeral was shown inside the "Wreckage rep. 1952" circle on any of the Government

charts for the area (Tr. 976), although the Government publication on Nautical Chart Symbols & Abbreviations prescribes that a *depth numeral or rock, obstruction or wreck symbol will be shown if the underwater object is considered as a hazard to navigation* of vessel (Ex. 16, Section 0 on Dangers at page 12; Tr. 136-37, 463).[3]

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[3]/The Government's publication on "Nautical Chart Symbols and Abbreviations," Dec. 1959 Issue (Ex. 16) lists and prescribes the following symbols, any one, or a combination, of which should have been used on the Coast & Geodetic Survey charts for the Smith Island area to show underwater dangers known or believed to exist in the area around the westerly boundary of the 10 fathom curve after the Coast Guard investigation of the 1952 CROCKER incident. The symbols and accompanying legend appear on page 12 of Ex. 16 under Sec. 0 on Dangers.

+	(Ob)	Sunken rock (depth unknown)
⊕	(Oc)	When rock of Ob is considered a danger to navigation
(5) Rk	5a	Shoal sounding on isolated rock (replaces symbol)
++	14	Sunken wreck which may be dangerous to surface navigation
(5½) Obstr	(Og)	Obstruction of any kind
Foul	17	Foul Ground
(3) Rep (1958)	17(a)	Reported, with date

The location for the notation on the charts for "Wreckage rep. 1952" was inaccurate and did not conform with the position reported by the Master of the CROCKER to the Coast Guard immediately after the 1952 incident (CR 24-29, Tr. 967). As placed on Ex. 79-A by witnesses, the plotted and reported position of the CROCKER incident and the "Wreckage rep. 1952" position are approximately 0.1 mile or over 200 yards (600 feet) apart, contrary to the implication of a lesser distance at page 4 of the Government brief.

The former Chief of the Nautical Chart Branch of the Coast and Geodetic Survey for several years following the 1952 CROCKER incident testified at the trial in the Court below that there was 20 fathoms (120 feet) of water shown in the area where the "Wreckage rep. 1952" notation was

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P.A.	41	Position approximate
P.D.	42	Position doubtful
E.D.	43	Existence doubtful

The possible application and use of the above symbols is demonstrated by overlays on the enlarged framed chart section now before this Court as Ex. 78.

The choice of symbols or combination of the above prescribed symbols would depend on whether the Government chose to continue showing reported wreckage after the CROCKER incident in 1952, or whether it chose to move the position of known danger inside the 10 fathom curve, as the report of Commander Conway of the Coast Guard indicated that his investigation showed should be done (Tr. 1057, Ex. 40). The Government did not follow either course of action, as its own expert pilot witness testified (Tr. 132-37, 141-42).

marked on Government charts (Tr. 969). Government witness Lindholm, another Puget Sound pilot, testified that from 20 to 30 fathoms of water was shown in this area on the Government charts (Tr. 139-40). Other pilots testified to similar depths of water shown on the charts (Tr. 828, 743) and that notations on the chart would not be considered by a navigator or a pilot such as Soriano as a warning of danger (Tr. 743, 746-47).

Depths as shown on Government charts are supposed to show the least depth of water in a particular area (Tr. 952). Contrary to the suggestion and claim of the Government in its Brief at page 29, blue tinting was not designated by the Government as a symbol for, or to characterize, a danger area (Tr. 943-944) on charts of the size and type in evidence in this case.[4]

The area just inside the westerly boundary of the 10 fathom curve was not designated or shown by the Government on its charts as "foul" or "foul ground" to warn of any danger to surface navigators, although this was one of the prescribed danger symbols designated in the Government publication on Chart Symbols and Abbreviations (Ex. 16

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[4]/The former Chief of the Nautical Chart Branch of the Coast and Geodetic Survey stated:

"Q Mr. Edmondston, did — or do you know of any in-instructions or any information disseminated by the Government whatsoever which states that the tinting out to a ten-fathom curve on any chart constitutes or characterizes that as a danger curve?

"A Specifically, no." (Tr. 944-45)

page 12 Sec. 0 on Dangers, Item No. 17; Exs. 8, 9, 10, 78, 79, 79-A). This was explained by the former Chief of the Nautical Chart Branch of the Coast and Geodetic Survey on the basis that the agency had no knowledge that the area was foul. (Tr. 974).

Other Puget Sound pilots with long experience stated that there was no depth sounding or other Government prescribed symbols on the charts to indicate that the "Wreckage rep. 1952" notation was a warning of danger in that immediate area (Tr. 138-40, 743, 505, 827-28).

The COAST PILOT, as published by the Government and covering this Smith Island area, contains many warnings and cautionary statements as to other hazards and dangers to navigation of surface vessels in the Puget Sound and eastern part of Straits of Juan de Fuca areas (Ex. 62). It has a section (at page 224) on the Smith Island area, together with annual supplements put out to up-date the data provided to navigators. The text of the 1959 edition and the supplements up to 1961 of the COAST PILOT contain absolutely no reference whatsoever to the "Wreckage rep. 1952" notation appearing on charts west of Smith Island (CR 21, Tr. 148). Likewise, there was no mention in this Government publication prior to 1962 of danger to vessels such as the ISLAND MAIL when passing either just outside or just inside the westerly boundary of the 10 fathom curve around Smith Island although other hazards and dangers to vessels closer in to Smith Island are set forth with particularity (Tr. 742, 748, 827; Ex. 62, p. 224). It

is more than a casual coincidence that within months after the ISLAND MAIL casualty the Government finally eliminated the "Wreckage rep. 1952" from its charts (CR 29) and inserted in COAST PILOT supplements (Ex. 62, 1962 Suppl. p. 224, CR 21), and later editions of the COAST PILOT specific references to underwater dangers within the 10 fathom area west of Smith Island. It is interesting to note, however, that the Government first compounded its previous errors by improperly describing the location of the 3.5 fathom rock as being east of Smith Island rather than west of it (Ex. 62, 1962 Suppl. p. 224, Ex. 63, p. 224 and CR 21-22).

D. CURRENTS

The Government 's Brief devotes considerable space to the subject of currents which a vessel might encounter while approaching Smith Island from the south (GB 38-39, 63). Here again, the Government had published data in 1961 for use of navigators and pilots in the form of Tide Tables and Current Tables (Ex. 67, 58). However, prior to the ISLAND MAIL casualty in 1961 there were *no currents predicted* or shown for any area or point immediately south or west of Smith Island, the last predicted currents in this Current Table being for positions off Point Wilson and Partridge Point (Ex. 57, Tr. 296). This was an Admitted Fact in the Pretrial Order (CR 22), although the Government now suggests that currents were established (GB 39).

Notwithstanding the absence of any published current data for the area the Government contended and now claims that the failure of Soriano to allow for an easterly set of the current on a flood tide while approaching Smith Island may have permitted the vessel to set over closer to the Island than Pilot Soriano expected, and within the 10 fathom curve. The fair preponderance of the evidence is to the contrary. The Government expert (civil service employee) witness on currents admitted that although he had made current *calculations after* the ISLAND MAIL casualty based on two test stations set up between Partridge Bank and west side of Smith Island (Ex. 74, Tr. 288), the currents had a "rotary" characteristic instead of a consistent directional characteristic (Tr. 290, 294), and that it was "difficult to predict the velocity and direction of the current" (Tr. 292). He also testified that in any event the current observations at these stations showed a calculated or *estimated velocity of only between one-half and three quarters of a knot* (Tr. 293) and that it could be *as low as a quarter a knot* (Tr. 294). He also stated that direction of current in this area on a flood tide may vary from 45 to 135 degrees (Tr. 295).

Soriano testified that there was no easterly set of the current (Tr. 483). Other pilot witnesses stated either that no current set was encountered, or that the current experienced in this area on a flood tide was "negligible" or "nonexistent" (Tr. 776, 830, 834). Likewise the watch mate on the ISLAND MAIL testified he did not think that a set of

the tide or current toward Smith Island was encountered by the ISLAND MAIL on this occasion. (III C.Gd. 289).

Finally, on the issue of current and set, it should be noted that the Finding of the trial Court stated merely that there was some easterly set of the current north of Point Wilson on a flood tide "the extent and amount of which has not been established" (FF 13 CR 271). Notwithstanding this the Government invites this Court to consider its Appendix III to its brief as a reliable, demonstrative representation of the area, including current direction and velocity that has been placed thereon, although there is no support for the same in the Findings of the trial Court, nor in the testimony of the Government's own expert witness on currents.

We shall express further objections to Government brief Appendix III later in this brief, particulary since it was not an Exhibit admitted in evidence but in fact is closely similar to proferred Exhibit No. 125, which the Government sought to use during the trial and which the Court refused to admit (Tr. 5, 37).

E. LABORATORY ANALYSIS BY F.B.I.

In its Specification of Error as to Findings 24 and 25, the Government claims in effect that the trial Court failed to accord sufficient credit to the results of the F.B.I. laboratory tests (Ex. 131) on metal pieces recovered by divers some time after the ISLAND MAIL casualty from the area around the 3.5 rock, or to give sufficient credit to the testimony of an F.B.I. agent concerning laboratory tests on

samples of other metal obtained from the hull of the ISLAND MAIL while on drydock after the casualty (GB 51, 75, 82, Tr. 212-26, Ex. 90).

To the extent that Findings 24 and 25 are related to or involved the F.B.I. laboratory tests and report, we cite the following to show that such Findings are not clearly erroneous, but are in fact supported by substantial evidence. In addition, the Government did not make any Specification of Error in its brief as to Finding No. 22 and the F.B.I. laboratory test results are therefore not a proper subject to be considered on this appeal, as earlier discussed herein.

Witness Heilman of the F.B.I. admitted that from a spectographic study and comparison of the metal samples removed from the damaged hull area of the ISLAND MAIL while on drydock after the casualty, and metal pieces recovered by the divers from the bottom near the 3.5 rock, it was "equally possible" that the bottom samples could have come from some other source (Tr. 224-5). Of the metal samples recovered by divers from the bottom and laboratory tested by the F.B.I., some pieces were 3/4" thick and others were 9/16" thick (Ex. 131, Tr. 222). Metal samples from the ISLAND MAIL were all 9/16" thick (Ex. 131).[5]

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[5]The deficiencies of the F.B.I. laboratory report insofar as establishing that metal plate recovered from the bottom came from the ISLAND MAIL may be demonstrated by the following extracts from the report itself:

The Government also urges that the trial Court's finding (FF 22) as to the source or origin of the metal samples recovered from the bottom by divers was clearly erroneous because such metal plate, according to its F.B.I. laboratory witness, "could have come" from the ISLAND MAIL (GB 51-52, 60). As mentioned by the trial Court in its Oral Decision, to accept this type and quality of testimony to establish the location of the ISLAND MAIL or the contention that it came in contact with the 3.5 rock "requires too much speculation and piling of inference upon inference" (Tr. 1138).

The trial Court, in its Oral Decision (incorporated into the Findings as FF 23-CR 278), stated that the metal samples brought up by the divers had not been shown to have definitely come from the ISLAND MAIL and that these metal pieces could have come from some other source (Tr. 1137). In Finding No. 22 the Court on the basis of the above testimony by the Government's own expert witness and its F.B.I. laboratory report (Exhibit 131), found that it was "*equally possible* that they (metal samples) came from some other source having metallurgically the same com-

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(p.1) "Since the submitted plates from the damaged ship (K 1, though K 3) are 9/16" thick, no further examination was made of Q-4." [A piece of metal recovered by the divers which was 3/4" thick] * *

"The largest piece of metal in Q-8 [a piece of metal recovered by the divers] has been identified as gray *cast iron which established it as a different type metal from the ship's plates.*" (Interpolation in brackets and emphasis added) (Ex. 131)

position" (CR 278). There was ample testimony as mentioned above to support this Finding No. 22 to the extent it relates or affects Findings Nos. 24 and 25 as challenged by appellant, and these findings are not clearly erroneous.

F. SQUAT AND SINKAGE

The trial Court's findings with regard to squat or sinkage appear in Finding No. 21 (CR 277). While the Government makes no Specification of Error in its brief of Finding No. 21, it spends considerable space urging this Court that this finding is erroneous (GB 52-56, 78-80).

Appellee Soriano maintains as to this subject that this Court should not consider such unspecified claim of error in findings in the Government brief or in oral argument. (Rule 18(2)(d) as discussed previously herein). Nevertheless, out of an abundance of caution, we cite the following to show that the trial Court's rulings and finding on this highly technical subject are not clearly erroneous.

The Government called one witness, its own civil service supervisory employee in the Navy Department at the David Taylor Model Basin, in an attempt to show that the ISLAND MAIL must have experienced the phenomena of sinkage or squat immediately before and at the time of impact (Tr. 313-14). This was offered in an attempt to explain the otherwise mathematical impossibility of the ISLAND MAIL at its established draft, and at the existing plus 5.4 foot stage of the tide, coming in contact with the 3.5 rock (Tr. 319-20).

It was established by the testimony of this Government expert witness that:

(a) His testimony was based on Government model basin experiments conducted with different types of vessels' hulls than the ISLAND MAIL, a modified C-2 type of vessel (Tr. 330, 341);

(b) That different characteristics of various types of hulls would affect the amount of sinkage or squat experienced (Tr. 342);

(c) That the Government did not conduct tests with a C-2 or ISLAND MAIL type hull (Tr. 330, 348);

(d) That amount of sinkage would be affected by whether a vessel was in relatively open waters (such as the Partridge Bank to Smith Island area being transited by the ISLAND MAIL), or in relatively confined areas (such as in a river, a narrow channel or in a model basin), where there would be more tendency to experience sinkage (Tr. 335)

(e) That amount of sinkage or squat would be affected by depth of water and the phenomena would be more pronounced in shallow water (Tr. 324, 337-38, 340);

(f) That it would take some time and distance for the phenomena of sinkage or squat to be experienced; i.e. the vessel does not suddenly change its draft or drop deeper into the water when passing from deep to shallower water (Tr. 321).

Because of the above, and particularly (a), (b) and (c), the trial Court granted appellee's motion to strike his testimony (Tr. 348), stating that it would not consider the testimony concerning squat or sinkage on the issue of Soriano's alleged negligence (Tr. 347, 348). In its last ruling on the question of admissibility, the Court stated it

would not consider this testimony for any purpose (Tr. 349), although it had preliminarily stated (Tr. 347) it would limit consideration of such testimony as generally explanatory of how the ISLAND MAIL might have contacted an underwater object at a specified depth when the draft of the vessel and stage of tide indicated it should have cleared such object.

Of even more importance, however, is the fact that by the testimony of this Government witness the *maximum* sinkage or squat of the ISLAND MAIL would have been 2.8 feet forward and 2.9 (or 2.8) feet aft (Tr. 339-40). There would have been less sinkage or squat before the ISLAND MAIL got into an *assumed* position where there was only 6 fathoms of water (Tr. 340).

This last testimony was referred to by the trial Court in its Oral Decision where it stated that (assuming admissibility of such testimony) "the maximum amount of sinkage" would not account for the difference between the height of the 3.5 rock from the bottom and the depth of the keel and hull of the ISLAND MAIL in the water (Tr. 1136). Thus, in Finding No. 21 the Court states:

> "... even if such testimony were accepted, there is nothing in the evidence to establish that the M/V ISLAND MAIL could have made contact with the 3.5 fathom rock." (CR 277)

To the extent (if any) that this Court may consider the Government's claim that testimony on sinkage or squat is material on this appeal, we earnestly submit that the above

cited evidence clearly supports the rulings and findings of the trial Court involving this subject and that neither Finding No. 21 nor Findings Nos. 24 and 25 are clearly erroneous.

III

ARGUMENT IN SUPPORT OF FINDINGS

(Specifications of Error Nos. 5 & 6)

A. SUMMARY

1. Appellee Soriano is not bound by nor affected by the Stipulation or Admissions of other parties in companion cases, consolidated for trial and this appeal, as to the identity and location of the uncharted underwater object with which the ISLAND MAIL came in contact.

2. The rule of *McAllister v. United States,* (1954) 348 U. S. 19, 99 L. Ed. 20 is applicable to trial Court Findings Nos. 24 and 25. These findings of the trial Court must be accepted unless they are clearly erroneous; they cannot be upset if they are supported by substantial though conflicting evidence. This Court may not substitute its judgment for that of the trial Court or make its own findings, but should only scrutinize the record to ascertain that it affords some reasonable basis for the result achieved. *Pacific Queen Fisheries v. Symes,* (CA 9, 1962) 307 F.2d 700; *Evans v. U. S.,* (CA 1, 1963) 319 F.2d 751 and cases cited. So tested, it will be clear that there is no merit to Government Specifications of Error Nos. 5 and 6 in the Soriano case.

3. The burden is upon the Government as appellant to convince this Court that the challenged Findings of Fact (FF 24 and 25) are clearly erroneous. *Pacific Queen Fisheries v. Symes, supra; City of Long Beach v. American President Lines,* (CA 9, 1955) 223 F.2d 853.

4. Findings of Fact to which the Government has not made any Specification of Error in its brief, as required by Rule 18(2) (d) of this Court, are not subject to review on this appeal. Therefore, Government criticism of Finding No. 22 as to metal samples and F.B.I. laboratory tests and Finding No. 21 as to sinkage and squat should be disregarded. In any event, there is ample evidence in the record to substantiate these Findings and they are not clearly erroneous.

Preliminarily, it is submitted that the burden is upon the Government as appellant to convince this Court that the challenged Findings of Fact (FF 24 and 25) by the trial Court are clearly erroneous.

As this Court has recently stated in considering another appeal in an admiralty case:

> "Secondly, it is not incumbent upon appellees to persuade this Court that the district Court's Findings of Fact are correct; on the contrary, the appellants must persuade this Court that the district Court's Findings of Fact are, as specified by appellants, clearly erroneous. Third, this Court must view the evidence in the light most favorable to the party who prevailed below; such a party must be given the benefit of all inferences that may reasonably be drawn from the evidence. The findings of the trial Court sitting without a jury must be accepted unless they are clearly

erroneous; they cannot be upset if they are supported by substantial evidence."

Pacific Queen Fisheries v. Symes
(CA 9, 1962) 307 F.2d 700, 706.

B. THERE IS NO CLEAR ERROR IN FINDING (FF 24) THAT THE FAIR PREPONDERANCE OF THE EVIDENCE FAILED TO ESTABLSIH THAT THE ISLAND MAIL WAS INSIDE THE TEN FATHOM CURVE (Government Specification No. 5)

It must be remembered that in the companion cases the other parties stipulated or admitted that the ISLAND MAIL struck the 3.5 fathom rock. This would place the vessel slightly inside the 10 fathom curve west of Smith Island. Appellee Soriano has not so stipulated nor admitted the position of the ISLAND MAIL at impact (CR 57), and the trial Court could not find from a preponderance of the evidence in the case of Government versus Soriano that the ISLAND MAIL had crossed inside the 10 fathom curve as urged by the Government (CR 278, Tr. 1139).

Finding No. 24 is supported by the citations to the record and transcript on specific items as contained in the foregoing Counter-Statement of the Case on behalf of appellee Soriano. The most salient points bearing upon Finding No. 24 are as follows:

1. The Government had negligently and affirmatively mislead pilots and navigators such as Soriano into the belief that in the area in question there was no underwater hazard to safe passage of vessels with draft comparable to the ISLAND MAIL by the charts, the COAST PILOT and

other aids to navigation which it published after the CROCKER incident. The Government failed to provide pilots and all other mariners with definite and accurate information as to the existence of such a hazard. Soriano, as a local pilot, relied upon such Government supplied intelligence, as he was entitled to do, and had no other or contrary special knowledge of any underwater condition in the area which would be a hazard to safe passage of the ISLAND MAIL (Tr. 268-69). Other Puget Sound pilots were in the same position (Tr. 733).

2. The pilot's intended course track for the ISLAND MAIL took it a minimum of about 2.0 miles west of Smith Island Light and just outside the westerly boundary of the 10 fathom curve (Tr. 404). Under the circumstances detailed hereinafter, this was a proper and safe course track for a vessel such as the ISLAND MAIL, until the Government belatedly corrected its charts and other navigational publications after the ISLAND MAIL casualty to more accurately and correctly show bottom conditions known by it to exist in the area. Other experienced pilots had been in the practice of following a similar course track when making such a passage (Tr. 748, 750, 765, 789, 827, 830).

3. The pilot (Soriano), the Watch Mate (Gunderson), the Master (H. D. Smith) and the Chief Mate (White) were either on the bridge or on deck at time of impact or arrived there within moments after the impact (Tr. 446, 582, 584-85, III C.Gd. 230). Each of these experienced navigators made independent important observations as

to the position of the vessel and water conditions in the area. Each witness testified that immediately after the casualty there was no evidence of kelp alongside or near the vessel, or any other indications that the vessel had passed inside the 10 fathom curve into an area of shallow water where there would be any danger likely to be encountered from underwater objects (Soriano at Tr. 446, 462; Gunderson at III C.Gd. 288-89, 295, 308, 375-76; Smith at Tr. 584-85, 588; White at III C.Gd. 223, 230). None of the Government witnesses who were called upon to plot Captain Soriano's course track placed the ISLAND MAIL inside the 10 fathom curve at the time of impact (Exs 74, 79; Tr. 102-15, Tr. 240, 301-10).

Considered in the light most favorable to Soriano, a fair preponderance of the evidence indicates that the vessel never got within the 10 fathom curve (FF No. 24) and therefore could not have come in contact with the 3.5 rock located approximately one-tenth of a mile inside this curve. Obviously, the Government has failed to sustain its burden of establishing in this Court that Finding of Fact No. 24 is clearly erroneous. *Pacific Queen Fisheries v. Symes*, (CA 9, 1962), 307 F.2d 700.

C. THERE IS NO CLEAR ERROR IN FINDING (FF 25) THAT A FAIR PREPONDERANCE OF THE EVIDENCE FAILED TO ESTABLISH THAT THE ISLAND MAIL STRUCK THE 3.5 ROCK SUBSEQUENTLY LOCATED WEST OF SMITH ISLAND (Government Specification No. 6)

The Government admits in its brief that to show how the ISLAND MAIL could have struck this 3.5 rock "does

indeed require a certain amount of speculation" (GB 78). To overcome this admitted deficiency in its case against Soriano the Government asks this Court to consider evidence as to sinkage and squat, which the trial Court rejected in whole or in part, and the effect of evidence as to F.B.I. laboratory tests, which the trial Court received in evidence but did not consider to be adequate to justify a finding as to impact of ISLAND MAIL with the 3.5 rock. Here again we submit that it is not within the province of this Court to substitute its own findings on this factual issue, for those of the trial Court, but only to test the trial Court findings against the *McAllister* clearly erroneous rule.

In applying the above test, perhaps the most significant factor is the mathematical impossibility of the ISLAND MAIL striking the 3.5 rock with the known draft of the vessel, the existing plus 5.4 foot stage of the tide and the established height of the rock above the bottom (CR 106, 20, 21). To this may be added the uncontradicted evidence from drydock surveys (Tr. 618) and from damage sketches (Exs. 19 A, B)prepared after drydocking which show the initial point of impact on the hull and the course, location and extent of the bottom damage sustained by the ISLAND MAIL (Tr. 613-19, Ex. 51). Pictures taken on drydock of the bottom damage also support the mathematical impossibility of the ISLAND MAIL striking the 3.5 fathom rock, as contended by the Government (Ex. 37, Tr. 613-14).

During the course of final arguments before the Court

below, proctor for appellee Soriano demonstrated this mathematical impossibility by a blackboard sketch incorporating and visualizing all of the above factors. Photograph of this sketch was preserved by application made to the trial Court (Tr. 1123) and has been incorporated into the record herein by agreement of counsel. For convenient reference it is reprinted herein as Appendix I to this brief. The calculations pictorialized by Appendix I take into account the draft of the vessel, depth of water, stage of tide and established point of initial impact of the unidentified object on the hull of the ISLAND MAIL near the bow.

There is no dispute in the record that initial impact between the underwater object and the hull of the ISLAND MAIL near its bow occurred at least 3.00 feet above the flat keel at Frame 159 (Tr. 488, 610, 613). As shown in sketch (Appendix 1), this would place 6.0 feet of water between the initial point of impact on the hull of the ISLAND MAIL and the extreme top of the 3.5 rock which is claimed by the Government to be the culprit.

As the trial Court so clearly pointed out, even if the Government was entitled to claim the benefit of the *maximum* squat or sinkage which its expert witness had calculated might have been experienced, it would still not cause the hull of the ISLAND MAIL to be deep enough in the water so that it would be physically possible for it to have come in contact with the 3.5 rock (Tr. 1136, FF 21, CR 277). Even the maximum possible 2'8" squat or sinkage

suggested by the Government's witness would still mean that the flat keel of the ISLAND MAIL at the bow would clear the top of the rock by a significant margin and the point of *actual impact* of the underwater object on the ISLAND MAIL was at least 3 feet above the flat keel.

Finally, the effort by the Government to persuade this Court to substitute its own finding for that of the trial Court as to the significance to be attached to F.B.I. laboratory tests on metal samples must fail because:

(a) The trial Court's finding that evidence showed it was "equally possible" (CR 278) that the recovered samples came from another source is not clearly erroneous but is fully justified by the admitted infirmities in the comparative analysis undertaken by F.B.I. on some of the test samples as earlier discussed; and

(b) The Government did not in any event claim by Specification of Error in its brief that there was any attack upon or claim of error against Finding No. 22 on this appeal. It is therefore not a claim of error which should be considered by the Court on this appeal.

D. APPENDIX III TO GOVERNMENT BRIEF IS INACCURATE AND NOT A PROPER DOCUMENT FOR CONSIDERATION ON THIS APPEAL

Attached to Government brief as Appendix III is an enlarged section of Chart No. 6450 for the Partridge Bank-Smith and Minor Island area. Appellee Soriano strongly urges that this document which was neither offered nor admitted into evidence is an inappropriate, inaccurate and misleading composite of courses, positions and other data in the area and should be completely disregarded by this Court on the present appeal: See: *Panaview Door* &

Window Co. v. Reynolds Metals Co. (CA 9, 1958) 255 F.2d 920. It does not contain markings placed upon the chart by witnesses testifying at the trial but presumes to be a pictorialization of various items prepared and placed upon the chart by some Government draftsman. A similar enlarged section of Chart No. 6450 with some comparable marks and legend placed thereon by a Government draftsman was offered in evidence and rejected by the trial Court (Ex. 125, Tr. 5, 35-37).

To demonstrate the inaccuracy and bases for objections to this Appendix III, attention is invited to the five different course tracks placed thereon (by government draftsman and not by witnesses). The course track furthest left in green color purports to represent the ISLAND MAIL courses. Imprinted on Appendix III for time 15:35 hours is a position for the ISLAND MAIL claimed to be 2.8 *miles* (first) abeam Smith Island Light. Both pilot Soriano and mate Gunderson testified that the ISLAND MAIL first came abeam Smith Island Light at a distance off of 2.6 *miles* (Tr. 93, 422, III C.Gd. 280). The use of 2.8 miles for the distance off Smith Island when the ISLAND MAIL first came abeam is not justified by the evidence in this record. Other course tracks laid out on Appendix III purport to relate to the CROCKER but are meaningless without support from witnesses and citation to the record.

Current directions and velocities on Appendix III to the Government brief are similarly unsupported, misleading and meaningless, as is the wire drag data and the uncon-

nected notation on Appendix III as to radar position established by the Master of the ISLAND MAIL.

IV

ARGUMENT IN SUPPORT OF CONCLUSIONS OF LAW

(SPECIFICATIONS OF ERROR NOS. 1, 2, 3, 4, 7 & 8)

A. SUMMARY

A pilot is not an insurer. In maritime cases, as in other cases of civil liability, the burden of proof rests on the party bringing the action. The District Court was correct in concluding that the Government had the burden of proving negligence on the part of pilot Soriano and that the alleged grounding took place in known unsafe waters (Specifications of Error Nos. 1, 3, 4 & 7).

The underwater object struck by the ISLAND MAIL was neither shown on Government charts or other navigational publications nor known to Soriano or other pilots who frequently took ships through the area in question. This case does not involve clearly established channels such as are maintained or exist in rivers and certain harbors. No presumption of fault arises where an ocean-going vessel strikes an unknown and uncharted object in an area where Government charts show sufficient water for safe passage. Navigators and pilots, such as Soriano, are entitled to rely on Government charts in the absence of any circumstances which should have been known to discredit their accuracy.

Even where a "presumption of fault" legitimately arises, it does not shift the ultimate burden of proof which remains with the libelant. Any such presumption disappears when all of the evidence has been presented to the trier of fact. It was therefore sufficient for pilot Soriano to have proven that the non-existence of fault, in the manner contended by the Government, was as probable as its existence. Actually Soriano went beyond that requirement and proved the mathematical impossibility of the ISLAND MAIL striking the 3.5 rock within the 10 fathom curve. Specifications of Error Nos. 2, 3, 4, 5 & 8 are therefore without substantial merit.

B. BURDEN OF PROOF (Specifications of Error Nos. 1, 3, 4 and 7)

The Government in its libel alleged, and in the Pretrial Order contended, that pilot Soriano was negligent in permitting the ISLAND MAIL to get inside the 10 fathom curve and in striking the 3.5 rock (CR 260-61 and CR 36-37). It did not rely on *res ipsa loquitor*. After failing in its proof, it now contends that the trial Court erred in placing the burden of proving these allegations and contentions on the Government. A brief summary of basic principles should dispose of this argument.

In maritime collision cases, as in other cases of civil liability, the ultimate burden of proof rests on the libelant. *THE CLARA*, (1880) 102 U.S. 200, 26 L.Ed. 145; *Mariblanca Navegacion, S.A. v. Panama Canal Company*, (CA 5, 1962) 298 F.2d 729. If the libelant fails to sustain its

burden of proving negligence, the libel must be dismissed, and "where there is a reasonable doubt as to which party is to blame, the loss must be sustained by the party on whom it has fallen:" *Griffin on Collision,* (1949 Ed.) § 24 and cases cited.

It has long been established that a pilot is not an insurer. *Gypsum Packet Co. v. Horton,* (SDNY, 1895) 68 Fed. 931. Thus, the United States in its suit against Captain Soriano had the burden of proving by affirmative evidence that the proximate cause of its loss was the pilot's negligence. *The Manchioneal,* (CA 2, 1917) 243 Fed. 801; *The Georgie,* (CA 9, 1926) 14 F.2d 98; *McGrath v. Nolan,* (CA 9, 1936) 83 F.2d 746; *United Fruit Co. v. Mobile Towing & Wrecking Co.,* (SD Ala., 1959) 177 F.Supp. 297; *Mariblanca Navegacion, S.A. v. Panama Canal Co.,* (CA 5, 1962) 298 F.2d 729.

In *The Georgie, supra,* the Government sued a shipowner and its pilot for damage to the Government's unmarked and uncharted cable which was snagged by the vessel's anchor during docking at a point claimed by the Government to be outside the established anchorage grounds. In reversing a decree against the pilot, this Court held, as a matter of law, that negligence had not been proven, and stated:

> "The libel is, of course, based on negligence, and the mere dropping of an anchor in public waters in the vicinity of an unknown and unmarked cable does not constitute such negligence."
>
> *The Georgie* (CA 9, 1926) 14 F.2d 98, 99

Other courts have adopted the same rule as to the burden of proof applied by the Ninth Circuit, as illustrated by the following:

> " . . . a pilot is responsible only for his personal negligence, and that must be affirmatively shown. . . . "
>
> *The Manchioneal* (CA 2, 1917) 243 Fed. 801, 806

> "Here again the burden is upon the United Fruit Company to satisfy the Court that what occurred did occur as a result of some lack of such required knowledge or skill on the part of [pilot] Captain Manders, or his failure to exercise such. The Court is of the opinion that this burden has not been met."
>
> *United Fruit Co. v. Mobile Towing & Wrecking Co.* (SD Ala. 1959) 177 F.Supp. 297, 302

In an action by a shipowner against the Panama Canal Company, which furnished the pilot, for vessel damage caused by striking the bank of the Panama Canal, the Court of Appeals for the Fifth Circuit first emphasized certain cases establishing that the doctrine of *res ipsa loquitor* was inapplicable and then held that the burden of proving negligence remained with the party claiming damages from a marine pilot.

> "*There is no burden on the Panama Canal Company to show the cause of the accident. The burden is on the libelant to prove that the cause was the pilot's negligence.* As the libelant now recognizes, it cannot rely (as, in part, it did in the trial of this case) on the doctrine of *res ipsa loquitor* to perform this function for it. (Citing cases) *It must rely on affirmative evidence of pilot negligence.*" (Emphasis added)
>
> *Mariblanca Navegacion, S.A. v. Panama Canal Company* (CA 5, 1962) 298 F.2d 729, 733

The Government's present argument that it did not have to prove Soriano negligent by showing he was inside the 10 fathom curve and contacted the 3.5 rock is refuted by the strikingly similar case of *New England S. S. Co. v. Packard Dredging Co.*, (CA 2, 1916) 239 Fed. 120. There, as here, though Government charts showed an adequate depth of water through which the vessel in question should have passed in safety, it contacted a submerged object and sustained bottom damage. There, as here, divers located certain rocks. The shipowner sought to recover for hull damage alleged to have been caused by contact with specific rocks claimed to have been negligently left on the bottom of the East River by the respondent dredging company. In affirming a decree dismissing the libel, the Second Circuit said:

> "*It is upon these rocks that the libelant claims the steamer struck, and unless it proves this the libel should be dismissed.*
>
> "Judge Hough discussed a great many propositions about which we will express no opinion. His final conclusion was that the *libelant had not sustained the burden of proof lying upon it to show that the steamer struck upon these rocks.* We concur in this. (Emphasis added)
>
> *New England SS Co. v. Packard Dredging Co.*, (CA 2, 1916) 239 Fed. 120, 121

C. CLAIM OF PRESUMPTION OF FAULT (Specification of Error No. 2)

1. No Presumption Of Fault In This Case.

It is true that a moving vessel which collides with a "fixed *and* known structure" is presumptively at fault.

Lehigh Valley Transp. Co. v. Knickerbocker Steam Towage Co., (CA 2, 1914) 212 Fed. 708; *General American Transp. Corp v. Tug PATRICIA CHOTIN*, (ED La., 1954) 120 F.Supp. 246. However navigators are entitled to rely upon government charts in the absence of special knowledge of some inaccuracy. *The Nathan Hale* (CA 2, 1900) 99 Fed. 460. Therefore, no such presumption of fault arises where a moving vessel strikes an unknown and uncharted underwater object in an area where government charts show sufficient water for safe passage of a ship of that draft considering the stage of the tide. *Reading Co. v. Pope & Talbot, Inc.*, (ED Pa., 1961) 192 F.Supp. 633; *American Dredging Co. v. Calmar SS Corp.*, (ED Pa., 1954) 121 F.Supp. 255 affirmed (CA 3, 1955) 218 F.2d 828; *Exner Sand & Gravel Corp. v. Gallagher Bros.*, (CA 2, 1946) 157 F.2d 291; *Cleary Bros. v. Steamtug WILLIAM E. CLEARY*, (SDNY, 1933) 1933 A.M.C. 591; *Griffin on Collision* (1949 Ed.) §§25 and 188.

In *Exner Sand & Gravel Corp. v. Gallagher Bros., supra*, the United States Coast and Geodetic Survey chart and the United States COAST PILOT for the Atlantic Coast showed the lower portion of the river with a controlling depth of 6 feet at low water. A scow drawing 8 feet was being navigated up the river when it struck a submerged pinnacle rock. At the stage of the tide encountered at the time of the accident, there should have been 8.9 feet of water. Holding that the trial Court's finding of no negligence was not clearly erroneous and affirming judgment

absolving the tug master from liability, the Court of Appeals for the Second Circuit said:

> " . . . the scow struck a submerged rock in that portion of the bed of the Rahway River which constitutes the channel as used, but somewhat nearer to the northerly shore than to the center, upon which it rested and from which it could not be moved. This rock damaged the bottom of the scow to such an extent that eventually it sank.
>
> "*The District Court found that this rock was pyramidal in shape and projected approximately 3½ feet from the bed of the river, that it was uncharted and unknown to navigators of the river,* including the master of the 'Wrestler,' and that at the time of the stranding there was a sufficient depth of water all around it to have permitted the scow, but for the rock, to have proceeded up the river in safety, there being a depth of water except for the rock at the time and place of the stranding of not less than 8.9 feet.
> " . . . it is evidence that it was not insufficient water in the channel, any more than insufficient water is the cause of any stranding, but the uncharted and unknown rock jutting up from its bottom which caused the disaster, and from this it follows that the tugmaster is not liable." (Emphasis added)
>
> *Exner Sand & Gravel Corp. v. Gallagher Bros.* (CA 2, 1946) 157 F.2d 291, 293, 294, 295.

2. Government Misconceives Effect Of Presumption Of Fault

Even where a "presumption of fault" is appropriate to assist a libelant in making a *prima facie* case, it does not change the ultimate burden of proof. Such a presumption is synonymous with the doctrine of *res ipsa loquitor* which the United States Supreme Court, on several occasions, has held does not have the effect of shifting the libelant's ultimate burden of proving negligence. *Sweeney v. Erving*

(1913) 228 U. S. 233, 57 L.Ed. 815; *Jesionowski v. Boston & Maine R.R.*, (1947) 329 U.S. 452, 91 L.Ed. 416; *Johnson v. United States* (1948) 333 U.S. 46, 92 L.Ed. 468. See: *Geotechnical Corp. v. Pure Oil Co.* (CA 5, 1952) 196 F.2d 199.

The Government, while it did not rely on the doctrine of *res ipsa loquitor*, now contends that certain other "presumptions" shifted the burden of proof and required pilot Soriano to establish the precise point of grounding and his own freedon from fault. Such presumptions, even where justified, are not rules of law. They are merely inferences of fact, based on experience and probabilities, and their only effect is to put upon a vessel subject to such a presumption the burden of going forward with evidence to show the inference is unwarranted. *Griffin on Collision* (1949 Ed.), § 25. When both sides have fully presented their version of what happened prior to a collision, the presumption disappears and the ultimate burden of proving negligence rests with the libelant. *Pennsylvania Railroad Co. v. SS MARIE LEONHARDT*, (CA 3, 1963); 320 F.2d 262; *Commercial Molasses Corp. v. New York Tank Barge Corp.*, (1941) 314 U.S. 104, 86 L.Ed. 89; *The Monongahela*, (CA 9, 1922) 282 Fed. 17.

In the *Pennsylvania Railroad Company* case, *supra*, the libelant, a bridge owner, sought to recover damages resulting from a collision with the respondent's vessel. In affirming a decree dismissing the libel, the court said:

". . . the Railroad contends that the district court should have given it the benefit of the presumption that the vessel was negligent because she collided with a fixed portion of the bridge. We are hard pressed to understand why the Railroad is making this contention at this point in the proceedings. *Perhaps it is implying that the presumption is a makeweight in the evidence which would require the mythical scales on which conflicting testimony is weighed to be tipped in its favor. If this is so, then the Railroad misconceives the function of the presumption.* The vessel owners complied with the procedural requirement of the presumption. As a matter of fact, *both sides fully presented testimony regarding their version as to what happened prior to the collision. Consequently, the presumption disappeared as a rule of law.* See 9 Wigmore on *Evidence* (3rd. Ed.) secs. 2490, 2491." (Emphasis added)

Pennsylvania Railroad Co. v. SS MARIE LEONHARDT, (CA 3, 1963) 320 F.2d 262, 264

The Supreme Court of the United States, in the *Commercial Molasses Corp.* case, *supra*, has made it clear that the ultimate burden of proof is not shifted.

"*The burden of proof in a litigation wherever the law has placed it, does not shift with the evidence*, and in determining whether petitioner has sustained the burden the question often is, as in this case, what inferences of fact he may summon to his aid. . . .

"Whether we label this permissible inference with the equivocal term 'presumption' or consider merely that it is a rational inference from the facts proven, it does no more than require the bailee, if he would avoid the inference *to go forward with evidence sufficient to persuade that the non-existence of the*

> *fact which would otherwise be inferred, is as probable as its existence.* It does not cause the burden of proof to shift. . . .
>
> "Wherever the burden rests, he who undertakes to carry it must do more than create a doubt which the trier of fact is unable to resolve." (Emphasis added)
>
> *Commercial Molasses Corp. v. New York Tank Barge Corp.* (1941) 314 U.S. 104, 86 L.Ed. 89, 96, 97

The Monongahela, supra, involved a suit by Crowley Launch & Tugboat Company against the United States Shipping Board for the capsizing and loss of its barge. This Court, after commenting upon the evidence introduced by the defendant to meet the plaintiff's *prima facie* case, affirmed the findings and decree of the trial Court in favor of the defendant, saying:

> "Granting, however, as we do, that there is uncertainty in respect to which of the several conditions was the proximate cause of the loss, still the defendant's evidence, when considered with plaintiff's, left the case in equipose — a situation where considering the whole evidence upon the issue of negligence, the Crowley Company, as the affirming party, must fail. Thayer's Treatise on Evidence, p. 369 et seq. Apparently this was the view of the learned judge of the District Court, and we are unable to say that it is against the weight of the evidence."
>
> *The Monongahela* (CA 9, 1922) 282 Fed. 17, 21

3. All Requirements As To Proof Satisfied By Soriano

Although the Government failed to make out a clear *prima facie* case against Soriano by establishing that he

grounded upon the 3.5 rock in a known unsafe area inside the 10 fathom curve, affirmative evidence offered by and on behalf of Soriano and cross-examination of Government witnesses established that it was mathematically impossible for the ISLAND MAIL to have contacted the 3.5 rock. This not only brought the scales into even balance but established by a preponderance of the evidence that Soriano was not at fault as alleged by the Government. Under any interpretation of the law as to the effect of "presumptions," the trial Court was not in error in its conclusions to which the Government takes exception in Specifications of Error Nos. 1, 2, 3, 4, 7 & 8 on pages 56 and 57 of its brief.

V

ARGUMENT IN ANSWER TO APPELLANT

A. STANDARD OF CARE

The standard of care required of a pilot such as appellee Soriano is the ordinary skill and knowledge of members of his profession. *The James A. Garfield* (SDNY, 1884) 21 Fed. 474; *Wilson v. Charleston Pilots' Association* (ED S.Car., 1893) 57 Fed. 227; *Gypsum Packet Co. v. Horton* (SDNY, 1895) 68 Fed. 931; *The Garden City* (CA 6, 1904) 127 Fed. 298; *The Dora Allison* (SD Ala., 1914) 213 Fed. 645; *Martin Co. v. Steam Tug Bermuda* (SDNY, 1945) 60 F.Supp. 43, affirmed (CA 2, 1946) 157 F.2d 431; *United Fruit Co. v. Mobile Towing & Wrecking Co.* (SD Ala., 1959) 177 F.Supp. 297.

> "*Did he* [*pilot*] *exercise, under the circumstances, ordinary care, caution, and maritime skill to prevent the occurrence? The highest degree of caution that can be used is not required.* It is enough that it is reasonable under the circumstances—such as is usual in similar cases, and has been found by long experience to be sufficient to answer the end in view. The Grace Girdler, 7 Wall. 203, 19 L.Ed. 113; In re Tyler, 149 U.S. 171, 13 Sup. Ct. 785, 37 L.Ed. 689." (Emphasis added)
>
> *The Sylfid* (SD Ala., 1909), 169 Fed. 995, 996 affirmed (CA 5, 1910) 176 Fed. 1022

Soriano was entitled to rely upon the accuracy of Government publications provided for use by mariners and cannot be deemed negligent in doing so, in the absence of circumstances known to him, or which should have been known to him, tending to discredit their accuracy. See: *The Nathan Hale* (CA 2, 1900) 99 Fed. 460; *United States v. Romaine* (CA 9, 1919) 255 Fed. 253. No contrary notice or knowledge was available to Captain Soriano prior to departure from Seattle. The Government attempted no such showing. In fact, through the negligence of the Government following the CROCKER incident, affirmatively misleading information concerning the area west of Smith Island had been disseminated and thereafter relied upon by Puget Sound pilots. Soriano exercised the care and skill of members of his profession in view of all published and then available information and was not bound to guard against this want of ordinary care on the part of the Government. See: *Casement & Co. v. Brown,* (1893) 148 U.S. 615, 37 L.Ed. 582; *Read-*

ing Co. v. Pope & Talbot, Inc. (ED Pa., 1961) 192 F. Supp. 663.

As the trial Court was aware, his conduct must be judged in the light of knowledge available to him at the time, and not by looking backward with wisdom born of the event. Prosser, *The Law of Torts* (3rd Ed.) Pg. 149.

> "*A court must avoid basing its decisions on hindsight, and it must make allowance for the legitimate differences in technique of various pilots.* In this case there is little to show that the pilot acted negligently." (Emphasis added)
>
> *Andros Shipping Co. v. Panama Canal Company* (CA 5, 1962), 298 F.2d 720, 725

Judge Learned Hand commented upon the element of discretion involved in navigation of a vessel as follows:

> "But we cannot charge a master because it seems to us, who were not there, that another choice would have been better. Only in case his conduct is outside the range of possible discretion, may we hold him for lack of seamanship; *error to become fault must be gross and flagrant.* (citing authority)" (Emphasis added)
>
> *The Imoan* (CA 2, 1933), 67 F.2d 603, 605

The record herein clearly shows that vessels of the draft of the ISLAND MAIL are frequently navigated by pilots at full speed in less than 10 fathoms of water at various points on Puget Sound (Tr. 144-45, 768-71, 833). As to this particular area west of Smith Island, other expert pilot witnesses testified that there were no known dangers or obstructions to navigation and no hazards shown on the charts with designated Government symbols

or in the COAST PILOT in the area between 1.6 and 2.5 miles west of Smith Island prior to the ISLAND MAIL casualty in May, 1961 (see pages 25 to 37 of this brief).

There is no provision in the rules of the road (Inland Rules applicable in these waters) and no rule of law establishing "grooved" steamer routes which would prohibit variances in course tracks of ocean-going vessels in this area. The *J. M. Davis* (WDNY, 1932) 1932 A.M.C. 1368; *Sandsucker Hydro* (ED Ohio, 1942) 1942 A.M.C. 1317; *Reading Co. v. Pope & Talbot, Inc.* (ED Pa., 1961) 192 F.Supp. 663; *American Dredging Co. v. Calmar S.S. Corp.* (ED Pa., 1954) 121 F.Supp. 255, affirmed per curiam (CA 3, 1955) 218 F.2d 823.

In the *J. M. Davis, supra,* involving the waters at the entrance to the harbor at Erie, Pennsylvania, the court said:

> "These are navigable waters in which the public has a paramount right as against any such obstruction to travel. (Citing cases)
>
> "There is no 'grooved' steamer route from Buffalo to Erie. Steamers generally take nearly the same route but a variance of hundreds of feet must necessarily result at times in changed weather condition or method of operation."
>
> *J. M. Davis,* (WDNY, 1932) 1932 A.M.C. 1368, 1371

In the *Reading Co. Case, supra,* the court stated:

> "*. . . we are aware of no rule of law which required her to be navigated within the limits of the*

dredged channel. As this Court said in *American Dredging Co. vs. Calmar S.S. Corp.*, 1954 A.M.C. 1211, 1223, 121 F.Supp. 255, 263 (Aff'd. per cur., 1955 A.M.C. 541, 218 F.(2d) 823):

"'That the steamship *Calmar* was navigating in the extreme easterly part of the ship channel and that its course would and did take it slightly outside of the channel does not, in my opinion, constitute any fault on the part of the vessel. Certainly, it is no fault of which this libellant can complain. I know of *no rule of law which limits the navigation of a vessel to a ship channel, as a land vehicle such as an automobile would be limited to operation on a highway. Oliver, supra; Eastern Transp. Co. vs. U.S., supra.* The charts introduced in evidence would indicate that on flood tide there would be sufficient water for safe passage of a ship of the draft of the *Calmar* on the course undertaken.'" (Emphasis added)

Reading Co. v. Pope & Talbot, Inc. (ED Pa., 1961) 192 F.Supp. 663, 666

B. STATUS OF THE GOVERNMENT

The Government urges that it is merely an innocent cargo owner and as such should be relieved of its burden of proving that the ISLAND MAIL struck the 3.5 rock inside the 10 fathom curve, particularly because it had no representative aboard the vessel and there was no eyewitness to the actual contact below the surface of the water (GB 58, 67, 72).

Of course, the Government was not just an innocent cargo owner. After the CROCKER incident, it had undertaken to search for wreckage in the same area, to perform certain statutory duties as to the investigation of that marine casualty and as to hydrographic surveys and publications of navigational charts and data concerning the

area in question, and carelessly failed to carry out such duties. 14 U.S. Code, §§ 2 and 86 and 33 U.S. Code, § 883(a). The Government thus was in possession of knowledge which would have been of great benefit to a pilot such as Captain Soriano. Its failure or lack of due care in conducting these undertakings and in accurately disseminating such information constituted negligence as the trial Court found in the companion case of Private Cargo versus the Government (FF 41 in Docket #20130, CR 159, Tr. 1142). *Indian Towing Co. v. United States* (1955) 350 U.S. 61, 100 L.Ed. 48; *United States v. State of Washington* (CA 9, 1965) 351 F.2d 912; *El Paso Natural Gas Co. v. United States* (CA 9, 1963) 343 F.2d 145; *Eastern Transportation Co. v. United States* (ED Va., 1928) 29 F.2d 588. In the ISLAND MAIL casualty the Government was "negligent – perhaps grossly so" according to the trial Court (Tr. 1142). Under the facts of this case it is not entitled to the benefit of any presumption of fault on the part of pilot Soriano. See: *Stevens v. The White City* (1932) 285 U.S. 195, 76 L.Ed. 699; *Marine Fuel Transfer Co. v. The Ruth* (CA 2, 1956) 231 F.2d 319.

In a suit by a barge owner against tugs for collision damages to the barge while out of the owner's possession, the Supreme Court early rejected a similar argument that inconvenience or difficulty in securing testimony would relieve the libelant of its burden of proof, saying:

"Neither is it material that the facts of the case and the causes of the collision are peculiarly within the knowledge of the respondents. It is alleged in the present case, as one of the inconveniences of the libelant's situation, that it would be compelled, in order to establish the allegations of the libel, to resort to the testimony of those navigating the respective tugs, and thus call witnesses interested to exonerate the vessel to which they were attached. We are not aware, however, of any ground on which such an inconvenience can affect the rule of law which governs the rights of the parties. . . ."

McNally v. The L. P. Dayton (1887) 120 U.S. 337, 30 L.Ed. 669, 675

C. GOVERNMENT CASES DISTINGUISHED

Cases to the contrary cited on pages 65 through 68 of the Government's brief, with but three exceptions, involve the striking of an anchored vessel or known and visible objects. *The Oregon* (1895) 158 U.S. 186, 39 L.Ed. 943 (anchored, lighted vessel); *Carr v. Hermosa Amusement Corp., Ltd.* (CA 9, 1943) 137 F.2d 983 (anchored barge giving proper signals); *The Virginia Ehrman* (1877) 97 U.S. 309, 24 L.Ed. 890 (anchored, lighted dredge); *The Louisiana* (1866) 3 Wall. 164, 18 L.Ed. 85 (stranded vessel outside channel); *Seaboard Airline R. Co. v. Pan-American & Transport Co.* (CA 5, 1952) 199 F.2d 761 (drawbridge); *The Victor* (CA 5, 1946) 153 F.2d 200 (anchored vessel in daylight); *Ford Motor Co. v. Bradley Transp. Co.* (CA 6, 1949) 174 F.2d 192 (crane on dock); *National Development Co. v. City of Long Beach* (SD Cal., 1960) 187 F.Supp. 109 (breakwater with lighthouse).

The three other cases cited by the Government as creating a presumption of fault on behalf of the pilot all involve navigation in dredged or confined river channels and are distinguishable on their facts.

Matheson v. Norfolk and N. A. S. S. Co. (CA 9, 1934) 73 F.2d 177, involved a Columbia River pilot who let his vessel get outside the dredged channel onto a well known shoal (Desdemona Sands). In filing his official pilotage report, which was later received in evidence at time of trial, he admitted that he let his vessel "get too far over on the north side of the channel" and that it was "a misjudgment on my part regarding the set of the tide." From this situation, the court said it "must infer fault unless good proof exculpates the navigator."

In *Louis Dreyfus v. Patterson S.S. Co.* (CA 2, 1934) 43 F.2d 824, a cargo owner sued for damages caused when the pilot, in navigating a well known channel entrance into the Cornwall Canal in the St. Lawrence River, allowed his ship to get out of position. The master had warned the pilot he was too far to the left of the channel, but the pilot permitted her to lose way and drift still further to the left where she took the ground. The pilot did not testify at the trial, and the master had no explanation for the grounding, "except somewhat faintly to suggest that the ship had been carried off to port by the river currents." Upon these facts, the court said this was "a situation from which we must infer fault."

The Arlington (CA 2, 1927) 19 F.2d 285, involved a suit by a cargo owner against the tug which had grounded its barge. The tug master encountered fog on the Hudson River and instead of turning about and stemming the tide until the fog lifted, as others did successfully, elected to seek a wharf. He intentionally passed up several public wharves whose approaches were known in favor of a private wharf owned by the New York Insane Asylum, whose approaches were unknown to the tug master, although rivermen with special knowledge knew them to be difficult. The tow struck a ledge about 150 feet off the wharf which was outside the customary navigation channel. Under these facts, the court held that by voluntarily leaving the channel, the tug master was presumed to be at fault.

D. IMPOSSIBILITY OF CONTACTING 3.5 ROCK

Finally, the Government contends that it was not necessary to show that it was mathematically possible for the ISLAND MAIL to have contacted the 3.5 rock, claiming that proof of reasonable probabilities was all that was legally required (GB 77-78). This argument not only ignores the Government's contentions in the Pretrial Order, on which it had the burden of proof, but it is refuted by respectable authority. In the very similar case of *New England S.S. Co. v. Packard Dredging Co.* (CA 2, 1916) 239 Fed. 120, a steamer struck a submerged object in the East River and then moved on. There, as here, bottom damage to the vessel was sur-

veyed and precisely located during drydocking. Remarkably, divers were used in both cases to locate and measure underwater rocks not previously known or believed to be present in the area.

The shipowner sought to recover for bottom damage which it alleged was caused by contact with specific rocks claimed to have been negligently left at a point on the bottom of the East River by the respondent. From divers' measurements of the rocks and known location and position of damage on the bottom of the vessel, the trial Court determined that it was impossible for the ship to strike the particular rocks specified in the libel.

The Second Circuit stated:

> "Assuming that the rocks were thrown up by the Dredging Company, and that they should have been buoyed by it, we do not believe the steamer touched them, the scorings on her bottom show that when the accident happened the steamer must have been proceeding on a steady course because they ran parallel to the keel. *It would not have been possible for two rocks within 8 feet of each other to make these scorings, which were at points 20 feet apart; nor could the bottom of a steamer drawing 13 feet strike a rock with only 11 feet of water over it, more especially at a point 100 feet abaft the stem.* Finally, the highest of the two rocks found would have struck on the port side of the keel, whereas the serious damage was done on the starboard side." (Emphasis added)
>
> *New England S.S. Co. v. Packard Dredging Co.*, (CA 2, 1916) 239 Fed. 120, 121, 122

The final comment of the Second Circuit, in affirming the decree dismissing the action, is particularly apropos

to the trial Court's decision and findings herein and the position of pilot Soriano on this appeal:

> "The steamer may have touched bottom at some point on or near the place where the respondent was working, but we are satisfied she did not touch the rocks in question."
>
> *New England S.S. Co. v. Packard Dredging Co.* (CA 2, 1916) 239 Fed. 120, 122

VI

SUMMARY

This case of Government versus pilot Soriano, and the companion cases which were consolidated for trial, went through extensive pleadings, discovery and unusually detailed pretrial proceedings. To illustrate this, we invite this Court's attention to the voluminous docket entries in the Court below (CR 3-11). These show not less than eleven pretrial conferences between counsel and the trial judge, and there were many more pretrial sessions not attended by the Court.

The trial Court, with a background of considerable professional and judicial experience in the specialized field of admiralty law, saw and heard the testimony of many witnesses, some of whom had also testified at the Coast Guard Investigation. In addition, the trial Court read many hundreds of pages of this Coast Guard Investigation transcript which was stipulated for use as evidence.

The consideration given by the trial Court to the unusual features and complexities of this and the companion cases, as evidenced by the detailed pretrial order and the extensive findings and conclusions eventually entered, should not be disturbed by this Court. The case involved essentially factual questions as to which we submit that there is not only a failure by the Government to show "clear error" but substantial support for the findings challenged by the Government.

The following comments by Professor Prosser in his treatise on the *Law of Torts*, relating to proof of negligence as affected by existing conditions, are pertinent to the position of pilot Soriano in the navigation and piloting of the ISLAND MAIL on the day of this casualty.

> "*The idea of risk necessarily involves a recognizable danger, based upon some knowledge of the existing facts,* and some reasonable belief that harm may follow. A risk is a danger which is apparent, or should be apparent, to one in the position of the actor. *The culpability of the actor's conduct must be judged in the light of the possibilities apparent to him at the time, and not by looking backward 'with the wisdom born of the event.'*" (Emphasis added)
>
> Prosser, *The Law of Torts* (3rd Ed.) Page 149

With respect to pilot Soriano's conduct and the contact of the ISLAND MAIL with an unidentified and uncharted underwater object in an area where there was no such danger shown on Government charts and other

publications, an earlier statement of this Court is pertinent:

> "Good seamanship does not require foreknowledge of unprecedented events."
>
> *President Madison* (CA 9, 1937) 91 F.2d 835, 841

The law does not require a pilot to inform himself as to the existence and exact location of every underwater hazard. In the case of *The Georgie,* which involved an unmarked telephone cable in San Francisco Bay, the location of which was not "indicated on any charts of the Bay," this Court said:

> "The court below ruled as a matter of law that it is the imperative duty of every pilot navigating the waters of San Francisco Bay to fully inform himself as to the exact location of every Government cable, known or unknown. . . . In the absence of statute, we are not prepared to say that any such onerous duty is imposed by law upon those engaged in the rightful navigation of the public waters of the state or United States."
>
> *The Georgie* (CA 9, 1926) 14 F.2d 98, 99

In light of the foregoing authorities, it is submitted that the Government failed in its burden of proving negligence of the pilot. The findings of the trial Court are not clearly erroneous and the conclusions of law follow logically therefrom. The decree absolving pilot Soriano must be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

CHARLES B. HOWARD
Proctor for Appellee

APPENDIX I

Blackboard Sketch Used During Final Argument In Trial By Proctor For Appellee (Tr. 1123)